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DATO' SERI TIMOR SHAH RAFIQ v. NAUTILUS TUG & TOWAGE SDN BHD

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
AHMAD NASFY YASIN JCA
B SEE MEE CHUN JCA
[CIVIL APPEAL NO: W-02(NCC)(A)-1980-10-2019]
13 JULY 2022

C **Abstract** – *Proper corporate governance requires the keeping of proper accounting records of the company pursuant to the Companies Act 2016. The minority directors were reasonable in their pursuit of leave to commence a derivative action against the majority directors, who were holding the management and control of the company, and who had failed to shed light on the substantial amounts advanced. An application* D *for leave to commence a derivative action is subject to satisfaction of the threshold that the action is commenced in good faith and prima facie in the best interest of the company; there was no necessity to show that the action was bound to succeed.*

E ***COMPANY LAW:*** *Derivative action – Action taken by minority shareholders – Payment of shareholders' interest not substantiated by relevant documents – Whether company's accounts kept in order – Whether failure to keep proper accounting records give rise to fictitious transactions – Whether all payments evidenced by independent supporting documents – Whether majority shareholders* F *caused substantial losses to company – Whether company at risk of further loss – Whether minority director has statutory right to inspect books and records of company – Whether majority directors immune from liability by having management control and rights*

G ***COMPANY LAW:*** *Derivative action – Leave – Action by minority shareholders – Payment of shareholders' interest not substantiated by relevant documents – Whether company kept proper accounting records – Whether proposed action had reasonable prospect of success – Whether fulfilled threshold test of acting in good faith and prima facie in best interest of company*

H The JV company was Nautilus Tug & Towage Sdn Bhd ('company') and the minority shareholders was Nautilus Supreme Sdn Bhd ('NSSB') whilst the majority shareholder was Azimuth Marine Sdn Bhd ('AMSB'). The company, upon recommendation by Captain Suresh, the CEO of the company, entered into an agreement with Shin Yang for it to build and I deliver tug boats to the company for a total purchase price of USD68.5 million. Captain Suresh arranged for a facility agreement with EXIM Bank Berhad ('EXIM Bank') to part finance the purchase, whilst the differential

sum was to be financed by way of shareholders' advances. Both AMSB and NSSB agreed that the balance 30% of the total purchase price to be so financed. Upon negotiation, the final amount payable to Shin Yang was further reduced and the tug boats were subsequently delivered to the company. However, the company later received a letter from Shin Yang claiming a sum of USD21,439,421.72 was still owing by the company. This led the minority directors, Dato' Seri Timor ('Timor') and Dato' Wan Mohamed Yaacob ('Wan') to seek clarification, but there was no satisfactory explanation given. Hence, Timor applied under ss. 167, 359 and 362 of the Companies Act 1965 for an order that the accounting and other records of the company be opened for inspection by an independent auditor. The application was allowed and an independent auditor, Crowe Horwarth, was given access to the files and they produced three reports with the conclusion that the shareholders' advances of RM 94.4 million could not be substantiated nor verified. Timor, subsequently, applied for leave to commence a derivative action on behalf of the company under s. 348 of the Companies Act 2016 ('CA'), naming the company as the defendant. The proposed derivative action was directed at holding the putative defendants jointly and severally liable and accountable for the shareholders' interest of RM14,619,166.47 paid out by the company to AMSB and NSSB premised on the shareholders' advances which the plaintiff claimed were not properly substantiated by any documents. The plaintiff further sought to rectify and restate the company's audited accounts by reversing the shareholders' advances recorded in the books. Following that, the plaintiff sought to hold the putative defendants, the majority directors and officers of the company, liable for breaches of statutory, fiduciary, equitable and contractual duties. The Judicial Commissioner ('JC') was convinced that there was nothing amiss as the ship builder had confirmed having received payment and further, that the auditors had not qualified the accounts whatsoever and therefore, dismissed the application. Hence, this appeal.

Held (allowing appeal; setting aside order of High Court)
Per Lee Swee Seng JCA delivering the judgment of the court:

(1) At leave stage, Timor had to show that his proposed action had a reasonable prospect of success and not that it was bound to succeed. Under s. 348 of the CA, an applicant must demonstrate that: (i) he is acting in good faith; and (ii) it is *prima facie* in the best interest of the company for leave to be granted to commence a derivative action against the majority in control of the company and the relevant officers of the company responsible for the company's losses. In light of the Board's refusal to provide answers to the questions posed by Timor or furnish the relevant evidence, it was reasonable for Timor to issue a statutory notice to the Board of his intention to apply for leave under s. 348 of the Companies Act 2016 to initiate derivative proceedings

on behalf of the company. There was no element of bad faith in wanting to pursue this issue of whether the shareholders' advances were properly substantiated before they could be so recognised under the general and approved accounting practice. (paras 19, 49, 50, 51 & 58)

(2) All journal entries, and especially material ones, must be supported and substantiated by documents, for otherwise fictitious transactions may be created. It was certainly disturbing that payments on behalf of the company by AMSB to Shin Yang amounting to USD19.9 million were only evidenced by journal entries in the company's general ledger without independent supporting documents. There were no documents to evidence the company had agreed to allow AMSB to make direct payments to Shin Yang on its behalf. There were also no documents to explain the rationale for AMSB paying Shin Yang on the company's behalf. (paras 62 & 63)

(3) The directors of the company were required to keep proper accounting records to substantiate especially material transactions and a failure to do so would expose the directors to a breach of statutory and fiduciary duties. In permitting the company to pay out shareholders' interest to AMSB and NSSB based on a wholly unverified debt, the majority directors and management had not only potentially caused the company substantial loss, but also exposed the company to a risk of further substantial loss in the form of significant tax liability and penalties arising from capital allowances claimed. The JC, therefore, failed to appreciate the *prima facie* culpability and wrongdoing of the majority directors and management of the company. (paras 72, 73 & 77)

(4) The Shin Yang's letters did not indicate the identity and details of the payer, instead, it only indicated that payments were made by way of remittance. If this was indeed the case, the remittance records for the transfers should be available in the company's accounting records, to confirm actual payment and receipt of these payments. There was no reason as to why more light should not be shone on the transactions, more so, when companies should be concerned that they do not become unwittingly the conduit for money laundering. As a director of the company, the plaintiff had a statutory right to inspect the books and records of the company. (paras 84, 88 & 97)

(5) There was no basis for saying that as EXIM Bank raised no question on or quibble the audited accounts furnished by the company, then by the same token the minority shareholder would have no right to complain. Whether or not EXIM Bank had any complaints, had absolutely no bearing on the issue, the subject matter or merits of the

proposed derivative action, or Timor's good faith in applying for leave. The satisfaction of the minority shareholders on the veracity or otherwise of the majority shareholder's contribution towards the shareholders' advances was none of the bank's business or concern. (paras 105 & 107)

(6) Whilst the shareholders' agreement gave AMSB the right to management control over the company, that had nothing to do with the issues in the application for leave. Certainly, having management control and rights could not conceivably exonerate or immunise the majority directors and management from liability for breach of the duties they owe the company. No law immunises a person from accountability or liability for wrongdoing merely because the person has the right of management and control. The High Court had erred in giving undue deference to the action of the majority directors merely because they were in control of the management of the company without due regard being given to a probable breach of statutory duty of directors to keep proper accounting records to substantiate material transactions of the company. (paras 109, 111 & 115)

(7) The High Court was plainly wrong in finding that Timor and NSSB had not raised the discrepancies in the shareholders' advances with the company or minority shareholder AMSB. The documentary evidence plainly showed when the company received Shin Yang's demand, Timor had made repeated requests for supporting documents related to the accounts and copies of the relevant accounting records at Board meetings and by emails and letters. He also sought to inspect the books of the company. The High Court also failed to appreciate that the issue of dividends was a completely separate matter from the shareholders' advances. (paras 127 & 128)

(8) The main objective of an audit is not to detect specific irregularities *per se* but for the external auditor to express an opinion on whether the financial statements prepared by the management and directors give a true and fair view of the financial position of the company and are in all material respects in accordance with an applicable financial reporting framework. The JC should have taken into consideration the reports and observations by Crowe Horwath, the independent professional audit firm, which indicated there were material and significant irregularities in the company's audited accounts, which had not been detected by the auditors. The fact that accounts of a company have been audited does not absolve directors of their duties in regard to the company's accounts. *Prima facie* that plaintiff had crossed the threshold test of having acted in good faith and for the best interest of the company in his leave application. (paras 138, 145 & 149)

(9) The company's accounts were only audited by two auditors, as the third auditor, BDO, had abruptly resigned without signing off and lodging the company's financial statements for FYE 2017 although the majority directors by then had approved the audited accounts and authorised Captain Suresh and Johari to sign and submit them. The JC should have considered the resignation of BDO as an auditor of the company as a relevant factor in exercising his discretion whether or not leave should have been granted for the derivative action. (paras 135 & 137)

(10) When a minority director highlighted discrepancies discovered pursuant to an independent audit carried out following the inspection order of the court, the court should look at it dispassionately and see if *prima facie* there are some merits in the complaint justifying a derivative action. The existence of hostility or disputes between shareholders, or even questionable motivations are by themselves insufficient to show lack of good faith. The suit, if successful, could only benefit the company and the majority shareholder would also stand to gain and would have nothing to lose if greater light was shed on the advances by the majority shareholder to fairly and accurately reflect the sums advanced. The plaintiff had fulfilled the threshold test of good faith and for the best interest of the company in his concerns that the company should comply with the requirements of keeping proper accounting records of the company as required under the Companies Act 2016. Hence, the court granted leave to commence derivative proceedings against the putative defendants named. (paras 151 152, 185, 186 & 188)

Case(s) referred to:

Abdul Rahim Suleiman & Anor v. Faridah Md Lazim & Ors [2017] 1 CLJ 633 CA ***(refd)***

Ang Thiam Swee v. Low Hian Chor [2013] 2 SLR 340 ***(refd)***

Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak [2010] 7 CLJ 808 CA ***(refd)***

Ganam Rajamany v. Somoo Sinniah [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123 FC ***(refd)***

Khiudin Mohd & Anor v. Bursa Malaysia Securities Bhd & Another Case [2012] 7 CLJ 407 HC ***(refd)***

Kontron Asia Pacific Design Sdn Bhd & Anor v. Quah Sin Chye & Ors And Another Appeal [2018] 8 CLJ 490 HC ***(refd)***

Law Siew Ngoh v. Bursa Malaysia Bhd & Anor [2017] 1 LNS 1262 HC ***(refd)***

Nautilus Tug & Towage Sdn Bhd v. Nautical Supreme Sdn Bhd & Ors [2022] 4 CLJ 594 HC ***(refd)***

Nurcombe v. Nurcombe [1984] BCLC 557 ***(dist)***

Ong Keng Huat v. Fortune Frontier (M) Sdn Bhd & Anor [2015] 10 CLJ 599 HC ***(refd)***

Re Firedart Ltd; Official Receiver v. Fairall [1994] 2 BCLC 340 ***(refd)***

Richardson Greenshields of Canada Limited v. Kalmacoff et al (1995) 22 OR (3d) 577 ***(refd)***

Soo Boon Siong v. Saw Fatt Seong & Ors [2008] 1 CLJ 365 CA ***(refd)***

Swansson v. Pratt [2002] NSWSC 583 ***(dist)***
Tai May Chean v. United Eastern Resources Sdn Bhd & Anor [2022] 2 CLJ 757 CA ***(refd)***
Teo Gek Luang v. Ng Ai Tiong [1999] 1 SLR 434 ***(refd)***
Westcourt Design Sdn Bhd v. Westcourt Furnishing (M) Sdn Bhd [2015] 11 MLJ 735 ***(refd)***

Legislation referred to:
Companies Act 2016, ss. 167, 244(1), 245(1), 249(2), 250, 266, 282, 284, 348(4), 359, 362
Evidence Act 1950, ss. 91, 92

Companies Act 1985 [UK], s. 221

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[Editor's note: Appeal from High Court, Kuala Lumpur; Originating Summons No: WA-24NCC-392-08-2018 (overruled).]

Reported by S Barathi

JUDGMENT

Lee Swee Seng JCA:

[1] This is yet another story of how parties to a joint-venture became embroiled in various suits and actions involving the persona dramatis of both the majority and minority shareholders in a Joint Venture (JV) Company. The escalating disputes are traceable to a mistrust arising out of a lack of transparency in the accounting transactions and records of material transactions involving payments for purchase of tug boats to the tune of USD68.5 million and a substantial advance by shareholders to the tune of USD20,550,000 which the shareholders were initially required to contribute.

[2] When the minority shareholder had contributed their portion and asked for evidence as to how the majority contributed their portion, the majority said it is paid direct to the ship builder of the tug boats. They further said that if it was not paid then surely the tug boats would not have been delivered and more importantly the ship builder would not have confirmed payment. In all probabilities, they would have sued because a substantial sum is involved.

[3] To the majority, that settles the matter and is a closed chapter and they cannot help the minority suffering from susceptibilities of a suspicious mind. However, the seed of suspicion had been sown and has now become full-grown with allegations and counter-allegations swirling round. Already there has been a cluster of reported cases involving the parties in our journals and more to come with both sides believing they are right and the other wrong.

[4] The JV Company, incorporated on 7 September 2012, is Nautilus Tug & Towage Sdn Bhd ("the company" or sometimes referred to as "NTT"). The project that the company is involved in is in Lumut consisting of the hire and charter of the tug boats to a subsidiary of a foreign company in a 15-year contract that promises to gross in some USD220 million in revenue.

[5] The Minority Shareholder is Nautilus Supreme Sdn Bhd ("NSSB") holding 20% of the shares in the company. The majority shareholder is Azimuth Marine Sdn Bhd ("AMSB") holding 80% of the shares in the company.

[6] The shareholders of AMSB are Dato' Ahmad Johari bin Tun Abdul Razak ("Johari") and Dato' Sri Suresh Emmanuel Abishegam ("Captain Suresh") through his family-owned company called East India Shipping Corporation Sdn Bhd ("EISC"). They are also the directors of the company and the other directors representing AMSB in the company are Dato' Abd Latiff bin Ahmad ("Latiff"), Jaya Sudhir a/l Jayaram ("Sudhir") and Hari Dass Ajaib ("Dass"). Dass and Latiff have since resigned from the Board of the Company effective 30 April 2018 and 2 May 2020 respectively. Sudhir and the Directors representing AMSB are referred to as the majority Directors.

[7] Dato' Seri Timor ("Timor") and Dato' Wan Mohamed Yaacob bin Salaidin ("Wan) were nominated by NSSB to the Company's Board of Directors ("minority Directors").

[8] It was discovered that a sum of over RM90 million equivalent to about USD19.9 million had been captured in the audited accounts of the company as shareholders' advances and when the minority Directors pressed for an answer from the company, they were rebuffed and finally Timor made an application to the High Court for the production of documents and the court granted the application. An independent auditor Crowe Horwath was given access to the files and they produced three reports with the conclusion that the shareholders' advance of RM94.4 million could not be substantiated nor verified.

[9] Timor, as the plaintiff, applied for leave of the High Court to commence a derivative action on behalf of the company under s. 348 of the Companies Act 2016, naming the company as the defendant. The proposed defendants in the first to fifth putative defendants are the directors nominated by the majority shareholder *ie*, Captain Suresh, Johari, Latiff and Dass and Sudhir.

[10] The sixth putative defendant, Azian binti Abdul Aziz ("Azian"), is the Financial Controller of the company. Captain Suresh as Chief Executive Officer ("CEO"), Latiff as Executive Director and Azian as Financial Controller together form the company's top management. The remaining two putative defendants are AMSB and NSSB, the company's shareholders.

[11] The proposed derivative action is directed at holding the putative defendants jointly and severally liable and accountable for the shareholders' interest of RM14,619,166.47 paid out by the company to AMSB and NSSB premised on the shareholders' advances which the plaintiff claimed were not properly substantiated by any documents.

[12] The plaintiff further seeks to rectify and restate the company's audited accounts by reversing the shareholders' advances recorded in the books. Following that the plaintiff seeks to hold the putative defendants who are the majority Directors and officers of the company liable for breaches of statutory, fiduciary, equitable and contractual duties.

At The High Court

[13] The learned High Court Judicial Commissioner ("JC") was persuaded by the fact that the auditors had audited the accounts after the purchase of the tug boats and was satisfied with the amount advanced especially by AMSB in proportion to the agreed 90:10 *ratio*. The learned JC was convinced that there was nothing amiss as the ship builder had confirmed having received payment and further that the auditors had not qualified the accounts whatsoever.

[14] The High Court was of the view that the threshold requirement of having acted in good faith for the best interest of the company had not been fulfilled and so the application was dismissed with costs.

[15] The plaintiff had appealed to this court and the parties shall be referred to as they were in the High Court as plaintiff and defendant or otherwise as Timor and the company respectively.

At The Court Of Appeal

[16] Before us the plaintiff argued that the learned JC failed to appreciate that the evidence plainly showed that Captain Suresh, the majority Directors and the company's top management had *prima facie* abused their positions and breached their duties to the company by misstating or otherwise turning a blind eye to serious irregularities in the company's accounts and caused the company substantial loss through payment of millions of ringgit in interest based on unsubstantiated shareholders' advances, not to mention having to repay the principal in the advances not substantiated at all with contemporaneous documents and cogent evidence.

[17] The plaintiff sought to persuade us that he has more than satisfied the threshold requirements of good faith and acting, *prima facie*, in the best interest of the company and that if successful, it is the company that will benefit and the shareholders, both the majority and minority.

[18] In short, the minority is saying that no harm can be caused but every good to be gained by shining more light into suspicious shareholders' advances and interests repayment such that if the material transactions cannot be substantiated by documents then they ought to be reversed out in compliance with International Financial Reporting Standards.

The Test At Leave Stage For Derivative Action

[19] Under s. 348 of the Companies Act 2016 ("the Act"), an applicant must demonstrate: (i) he is acting in good faith; and (ii) it is *prima facie* in the best interest of the company for leave to be granted to commence a derivative action against the majority in control of the company and the relevant officers of the company responsible for the company's losses.

[20] Section 348(4) of the Act provides that:

> In deciding whether or not leave shall be granted, the Court must take into account whether:
>
> (a) the complainant is acting in **good faith**; and
>
> (b) it appears *prima facie* to be in the **best interest of the company** that the application for leave to be granted. (emphasis added)

[21] The test of good faith is two-fold. First, the applicant must honestly believe in the existence of a good cause of action. Secondly, the application must not be brought for a collateral purpose. Apart from good faith, the court must also be satisfied it is *prima facie* in the best interest of the company for leave to be granted.

[22] The Court of Appeal in *Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak* [2010] 7 CLJ 808; [2011] 3 MLJ 636 explained the test of good faith as follows:

> [15] The second crucial requirement for the determination of the court in granting leave is **the need for the respondent to show that he was acting in good faith in making this application** (s. 181B(4)(a)). The onus of proof here is on the respondent on a balance of probabilities. The test of good faith is two-fold. **One is an honest belief on the part of the respondent,** and two, that this application is **not brought up for a collateral purpose ...** (emphasis added)

[23] The Court of Appeal had followed the dicta in the Australian case of *Swansson v. Pratt* [2002] NSWSC 583 as follows:

> [36] Nevertheless, in my opinion, there are at least two interrelated factors to which the Courts will always have regard in determining whether the good faith requirement of s. 237(2)(b) is satisfied. **The first is whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success.** Clearly, whether the applicant honestly holds such a belief would not simply be a matter of bald assertion: the applicant may be disbelieved if no reasonable person in the circumstances

could hold that belief. **The second factor is whether the applicant is seeking to bring the derivative suit for such a collateral purpose as would amount to an abuse of process.** (emphasis added)

[24] The approach to be taken by the court at the leave stage to determine if the application is *prima facie* in the best interest of the company is set out in the Court of Appeal case of *Abdul Rahim Suleiman & Anor v. Faridah Md Lazim & Ors* [2017] 1 CLJ 633, where it was held as follows:

[36] **in an application for leave, should not go into the merits of the case at the leave stage. Its role is to see if the application for leave is frivolous** … Secondly, in the matter of an application for leave under s. 181A of the Act, it would be the duty of the court to weigh all the circumstances and decide whether the claim ought to be pursued.

[37] At the leave stage, the issue is only whether it is in the best interest of the eighth respondent to pursue the claim. The apposite question therefore, should be whether, having considered the facts of the case, the eighth respondent **would gain substantially in money or money's worth and that there were genuine commercial considerations for not wanting to pursue claims** … (emphasis added)

[25] It has also been variously stated as that the intended action is a legitimate and arguable case and that it should not be frivolous or obviously unsustainable.

[26] Guidance may be had to a similar provision in the Canadian legislation, Robins JA, delivering judgment on behalf of the Ontario Court of Appeal in *Richardson Greenshields of Canada Limited v. Kalmacoff et al* (1995) 22 OR (3d) 577 at 585 explained this requirement of "*prima facie* in the best interest of the company" as follows:

The court is not called upon at the leave stage to determine questions of credibility or to resolve the issues in dispute, and ought not to try. These are matters for trial. Before granting leave, the court should be satisfied that **there is a reasonable basis for the complaint** and that **the action sought to be instituted is a legitimate or arguable one.** The preconditions of s. 339 (of the Trust and Loan Companies Act (SC 1991, c 45)) cannot be considered in isolation. Whether they have been satisfied must be determined in the light of the potential validity of the proposed action. (emphasis added)

Whether The Plaintiff Had Acted In Good Faith And *Prima Facie* In The Best Interest Of The Company Background And Build-up To The Dispute

[27] The core and only business of the company consists in a long term Harbour Tug Services Agreement ("HTSA") for an initial period of 15 years which the company had entered into with Vale Malaysia Minerals Sdn Bhd ("Vale") dated 11 April 2013 for the charter of seven harbour tug boats ("Tug Boats") with a total contract value of approximately USD220 million.

[28] Captain Suresh, with considerable experience and expertise in shipping, recommended that the company do enter into an agreement, which the company did, on 12 April 2013 with Shin Yang, a sale and purchase agreement ("SPA") for it to build and deliver the Tug Boats to the company for a total purchase price of USD68.5 million ("total purchase price"). Captain Suresh handled all negotiations and dealings between the company and Shin Yang.

[29] Captain Suresh, being the company's CEO, was on the driver's seat and so on 9 April 2013, he arranged for a facility agreement with EXIM Bank Berhad ("EXIM Bank") to part-finance the purchase of the Tug Boats. The facility of up to USD47,950,000 represented 70% of the total purchase price of the Tug Boats. The loan was to be disbursed directly to Shin Yang progressively ("facility agreement") subject to the usual conditions such as that the difference between the total purchase price and the facility should first be confirmed as having been paid to Shin Yang.

[30] It became obvious that the differential sum had to be financed internally by way of shareholders' advances, a financing approach not uncommon in JV Companies. AMSB and NSSB agreed the remaining 30% of the total purchase price amounting to USD20,550,000 (USD68,500,000 less USD47,950,000) ("balance purchase price"), be so financed. Shareholders' advances may be capitalised or be regarded and treated as a debt due from the company to its shareholders. That latter approach was agreed and that it will carry interest at the rate of 7% per annum to be paid to its two shareholders, AMSB and NSSB, based on the amount they have each contributed.

[31] On 16 December 2012, Captain Suresh furnished to Timor a breakdown of the shareholders advances the company required from both shareholders called the Equity Payment Schedule. The Equity Payment Schedule showed that after deduction of "brokerage fees" amounting to USD8.18 million, the company only required from shareholders a sum of USD12,370,000, of which NSSB's portion was USD1,864,176, to be paid in five instalments, with the balance to be paid by AMSB.

[32] However, sometime in early 2015, Captain Suresh had some good news for Timor in that NSSB was not required to pay the fifth instalment as he was negotiating a reduction in the final amount payable to Shin Yang in light of amongst others late delivery of the vessels. NSSB therefore only paid four instalments, amounting to RM4,998,882.52 (approximately USD1,550,003).

[33] With the shareholders' advances and the facility there was no problem paying the purchase price of each Tug Boat on delivery. The last Tug Boat was delivered to the company in June 2015, and by August 2015, it was all-system-go as all seven Tug Boats were operational and generating revenue for the company under the HTSA.

[34] However, on 3 August 2015, the company received a letter from Shin Yang claiming a sum of USD21,439,421.72 was still owing by the company ("Shin Yang's demand"). This meant out of the total purchase price of USD68,500,000, Shin Yang had only been paid USD47,060,578.28, which is even less than the sum (USD47,950,000) financed by EXIM Bank.

[35] Timor was more perplexed than puzzled by Shin Yang's demand for it raised serious questions as to the integrity of the company's financial records. It is more suspicious than strange that such a demand should be made in regard to payment of the balance purchase price to Shin Yang.

[36] Timor was labouring under the representation given by Captain Suresh that the AMSB had been contributing their portion of the shareholders' advances.

[37] Up to this point, Timor and Wan were not aware of the actual sum AMSB had paid the company towards their portion of the shareholders advances. They had entrusted this to the company's management and in good faith had assumed all along that AMSB was at the time also furnished with the Equity Payment Schedule and had duly complied and paid their portion.

[38] Following receipt of Shin Yang's demand, Timor at Board meetings and by numerous emails and letters to Captain Suresh made repeated requests for clarification and copies of the relevant accounting records. Nothing satisfactory came of this – in instances where answers were given, they were either incomplete or evasive. His request as director for access to the company's books and records was also denied by the majority Directors and management.

[39] Learned counsel for the plaintiff highlighted that this unsatisfactory state of affairs continued for about nine months after Timor's initial request for information on 12 August 2015.

[40] Timor was therefore constrained to apply under ss. 167, 359 and 362 of the Companies Act 1965 for an order that the accounting and other records of the company be opened for inspection by an independent auditor, Mr. Chan Kuan Chee, a partner of Crowe Horwarth. The application was filed with the High Court on 27 April 2016 and the High Court allowed the application on 16 January 2017 ("inspection order").

The Crowe Horwath Reports

[41] It was narrated that Crowe Horwath carried out an inspection of the accounting and other records made available to them by the company. Based on their inspection, Crowe Horwath furnished a total of three reports – a preliminary report on 15 February 2017 ("preliminary report"), a supplementary report on 16 April 2018 ("supplementary report") and a follow-up report on 14 August 2018 ("follow-up report").

[42] Very significantly, the preliminary report, supplementary report and follow-up report showed there was a lack of any independent, credible evidence to substantiate payment of approximately USD19.9 million recorded in the books of the company as shareholders advances by AMSB.

[43] It was pointed out by learned counsel for the plaintiff that despite the inspection order, the complete accounting records of the company were not made available to Crowe Horwath. As a result, a protracted exchange of correspondence ensued from February 2017 to November 2018, with Timor's solicitors repeatedly writing to the company's solicitors for copies of the accounting records and supporting documents to evidence payment by AMSB of their portion of the shareholders advances recorded in the books of the company.

[44] On 20 April 2018, Timor instructed his solicitors to forward Crowe Horwath's preliminary and supplementary reports to the Board and request answers to the following questions:

(i) Why the sum of USD19.9 million recorded in journal entries in the general ledger of the company as purportedly paid by AMSB directly to Shin Yang is not supported by any documents?;

(ii) Why only a sum of USD647,390 was paid by the company to Shin Yang, although NSSB had paid a sum of USD1.55 million (approximately RM4,998,882.52) to the company for remittance to Shin Yang?

[45] In the same letter, his solicitors also requested the Board to provide supporting documents to evidence the shareholders' advances in excess of RM90 million (USD21.9 million at an exchange rate of 4.1), recorded in the books of the company. It will be noted this sum of USD21.9 million is higher than the balance purchase price of USD20,550,000.

[46] As no substantive response was forthcoming from the Board, Timor's solicitors again wrote to the company's solicitors on 14 May 2018, to request that the Board revert by 17 May 2018.

[47] The company's solicitors replied on 17 May 2018 to claim the board was in the midst of collating the information and required until 24 May 2018 to furnish a reply.

[48] Alas, there was nothing forthcoming. In the event, the Board neither furnished an explanation or the documents sought. Instead, on 28 May 2018, the Board replied to claim the letters from Shin Yang purporting to acknowledge receipt of the balance purchase price ("Shin Yang letters") conclusively prove the balance purchase price had been fully paid. The Board also sought to deflect the issue by saying the audited accounts of the company had been certified and approved by the company's auditors and

NSSB had accepted shareholders' interest without objection. It was a case of the company skirting the issue – answering the questions not asked and not answering the questions asked.

[49] It was thus reasonable, in the light of the Board's refusal to provide answers to the questions posed in the letter dated 20 April 2018 or furnish the relevant evidence, for Timor on 31 May 2018 to issue a statutory notice to the Board of his intention to apply for leave under s. 348 of the Companies Act 2016 to initiate derivative proceedings on behalf of the company against the putative defendants and any other party responsible for the loss and damage suffered by the company.

[50] The company did not respond to the statutory notice from the Board. Timor therefore proceeded in August 2018 to apply to the High Court for leave to commence derivative proceedings.

[51] We do not detect any element of bad faith in wanting to pursue this issue of whether the shareholders' advances are properly substantiated before they can be so recognised under general and approved accounting practice. The majority shareholder should not resent nor resist the request for documents to substantiate this very material sum of USD19.9 million in the audited accounts of the company.

[52] To us it is a reasonable request for the company, though managed by the majority shareholder, to conduct its affairs properly and that a proper money trail is good for the shareholders and the company as well as the authorities like the Inland Revenue and the CCM and also not to be unwittingly caught by allegations of money laundering.

[53] Surely such a request is not too much to ask though it had not been asked for previously, because it is not uncommon for JV parties to proceed on the premise that everyone will go by the books and it is only when the expectations are not met that one is constrained to ask for supporting documents. No one is saying as yet that anyone is dishonest but that everyone should be seen to be honest.

[54] If such questions cannot be asked then it would tantamount to the majority shareholder telling the minority that you must exercise blind faith in me and trust me implicitly. We are reminded of how a pupil who asked the teacher too many questions are disliked and despised by the teacher as being a smart alec when in reality the teacher is afraid that he may not be able to adequately answer the pupil's question and that would be disastrously embarrassing.

[55] The education world has warmed up to the idea that pupils should be encouraged to ask questions for the purpose of teaching is certainly to teach the pupils to think and where independent thinking is allowed, then questions are allowed. We have gone beyond the classroom to the boardroom where

there should be no question on whether any questions may be asked of the financials and accounts of the company. It would be a sad day for financial accountability if there are questions that cannot be asked because if asked, it would mean that you are accusing the directors responsible for the finances of the company of being dishonest.

[56] The learned JC erred in requiring at this leave stage that Crowe Horwath must have made a determinative finding of wrongdoing on the part of the company. That is for the plaintiff to establish on a balance of probabilities at the trial and suffice, at this stage that the plaintiff has shown that the proposed claim has the prospect of success and that it is not frivolous or vexatious. At para. 25 of the judgment, the learned JC said:

> It bears repetition that the basis of the application is premised on the finding in the Crowe Horwath Reports. However, the reports do not arrive at a conclusive or final determination of any identifiable breach of procedure or wrongdoing on the part of the Defendant.

[57] Although the High Court rightly found that Timor had established an honest belief in a good cause of action and that he must show that he has an arguable or legitimate case, the High Court however failed to apply it or appreciate that an arguable case only means one which possesses a reasonable prospect of success, as opposed to one which is frivolous or fanciful.

[58] All that Timor has to show at this leave stage is that his proposed action has a reasonable prospect of success. There is no requirement in law for him to show at the leave stage that it is bound to succeed. The High Court erred when it required the evidence adduced to be conclusive or finally determinative of any wrongdoing by the putative defendants. We agree with learned counsel for the plaintiff that the plaintiff's claim against the putative defendants will have to be established on a balance of probabilities at the next stage, in the actual derivative proceedings brought once leave is granted.

[59] The learned JC failed to consider that the preliminary report was issued after Crowe Horwath had inspected the records made available to them by the company. It noted the unavailability of records and documents in regard to the shareholders' advances; set out a list of questions they wanted the management to answer; and the supporting information they required from management concerning this.

[60] As for the supplementary report, it reaffirmed Crowe Horwath's findings in the preliminary report, and states the "unavailability or nonkeeping of the above-mentioned records and documents raises grave concern over the manner in which the management maintain their accounting records".

[61] After 19 months of inspection (from January 2017 to August 2018), Crowe Horwath issued the follow-up report where they concluded "the veracity of the financial statements is called into question" (emphasis added), as the shareholders' advances from AMSB amounting to USD19.9 million is totally unsubstantiated by proper payment documentation.

[62] It goes without saying that all journal entries, and especially material ones, must be supported and substantiated by documents, for otherwise fictitious transactions may be created. It is certainly disturbing that payments on behalf of the company by AMSB to Shin Yang amounting to USD19.9 million were only evidenced by journal entries in the company's general ledger without independent supporting documents such as cheque images, telegraphic transfers, bank statements proving clearance of payments, bank advices from the paying or receiving bank and official receipts from Shin Yang.

[63] There are no documents to evidence the company had agreed to allow AMSB to make direct payments to Shin Yang on its behalf. There are also no documents to explain the rationale for AMSB paying Shin Yang on the company's behalf.

[64] As the majority Directors and management are unable or unwilling to provide supporting documents for the substantial amount AMSB is alleged to have paid as shareholders advances, the minority is entitled to approach the court for a finding as to whether this shareholders' advances should be reversed out and the accounts restated such that there is no need for the company to repay a dubious debt in the portion of the shareholders' advances so found and what more, the interest on it.

[65] Assuming for a moment that AMSB or the company's record keeping is so poor and that the payment was indeed direct from a third party to Shin Yang, then we would be expecting some accounting entries in the audited accounts of AMSB to reflect that, for money to the tune of USD19.9 million does not emerge from nowhere and land somewhere. After all, we are not talking about algebra or algorithm but simple doubleentry in accounting in that before money could go out, it must first have come in and before it could be deployed towards extinguishing a certain liability it must have first reached the accounts of the creditor company.

[66] The plaintiff had abandoned the prayer for a forensic report to be prepared and rightly so because we are not talking about forensic tracing but a simple receipt of a loan or advance from the majority shareholder into the company and payment therefrom to Shin Yang before EXIM Bank released its portion of the loan sum for the balance purchase price for the Tug Boats. The greater the resistance by the majority Directors to the relevant documents being produced the greater the resolve of the minority Directors to drill to root of the matter and to ferret out the truth.

[67] The learned JC must have forgotten about this abandonment of the plaintiff's prayer for a forensic report to be prepared and had placed reliance on it as a factor that he took into account in dismissing the leave application as follows:

> [34] It begs the question as to whether the Plaintiff was embarking on an extended fact finding exercise via this derivative action. It is no coincidence that the Plaintiff is seeking ancillary orders for a forensic auditor to be appointed to conduct a comprehensive audit on the Defendant's accounts. This Court is of the firm view that it clearly shows the uncertain state of the Plaintiff's case.

[68] The learned JC must have overlooked the fact that prayers 2(c), (d) and (e) of the originating summons pertaining to the appointment of a forensic accountant were formally withdrawn by Timor's counsel at the outset of the leave hearing. We agree with the plaintiff that the High Court should not have regard at all to these prayers which would have been struck out by the High Court and thus any further consideration of the factors referred to would be irrelevant and inappropriate.

[69] Captain Suresh in his affidavit conceded it is not the company's position that AMSB in fact paid the sum of USD19.9 million directly to Shin Yang:

> I refer to paragraph 16 of Timor's 1st Reply and respectfully state that it is never NTT's position that "AMSB paid the sum of USD19.9 million directly SYS." NTT's position is that Shin Yang has confirmed and acknowledged receipt of USD20,550,000.00 in respect of the balance to be settled by the shareholders …

[70] Communication in a simple matter such as this should not be made equivocal, contrived or convoluted for, after all, plain communication is what all should strive for. Is Captain Suresh saying that Shin Yang has given a credit term to the company to pay the sum of USD20.55 million? Is the confirmation of the differential sum having being received by Shin Yang meant for EXIM Bank's only? If that is so, how is it that the amount could be captured in the company's account as shareholders' advances with interest being paid on it?

[71] When convoluted language is being preferred to plain language, before long one gets tied into knots and any attempts to complexify a plain transaction that merely requires supporting documents should best be shunned altogether.

[72] We are in agreement with the plaintiff that the learned JC also, with respect, did not appreciate that in permitting the company to pay out, as of July 2017, shareholders' interest of RM11,815,625.64 and RM3,147,162.65 to AMSB and NSSB respectively based on a wholly unverified debt, the majority Directors and management have not only potentially caused the

company substantial loss, but also exposed the company to a risk of further substantial loss in the form of significant tax liability and penalties arising from Capital Allowances claimed, as noted in Crowe Horwath's follow-up report.

[73] The learned JC, with respect, may not have appreciated that it is required of the Directors of the company to keep proper accounting records to substantiate especially material transactions and a failure to do so would expose the Directors to a breach of statutory and fiduciary duties. In this regard, s. 245(1) of the Act provides:

> A company, the directors and managers of a company shall:
>
> (a) cause to be kept the accounting and other records to sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance sheets and any documents required to be attached thereto to be prepared; and
>
> (b) cause the accounting and other records to be kept in a manner as to enable the accounting and other records to be conveniently and properly audited.

[74] Learned counsel for the plaintiff drew the court's attention to *Re Firedart Ltd; Official Receiver v. Fairall* [1994] 2 BCLC 340 at pp. 120 to 121 where the court found a director to be in breach of his statutory duty under s. 221 of the UK Companies Act 1985 (similar in effect to s. 245 of the Act) as he had failed to maintain documents in the company's financial records to explain the company's expenditure and liabilities as recorded in the company's books:

> the official receiver gave the following further details about these figures –
>
> **Drawings**
>
> … there are no salary records to support these payments;
>
> **Cash**
>
> … there is no explanation as there are no expenses claims and/or vouchers available…
>
> **Travel etc.**
>
> … there is no supporting documentation or explanation for some GBP 12,370 out of the GBP 17,271.97
>
> Others
>
> the figure of GBP 22,432.57 includes the following payments made by Firedart for which there are no supporting vouchers or explanations … I accept the official receiver's report on these matters. I find that there were breaches of s. 221 in the respects mentioned above. Failure to make the relevant entries at all is obviously a breach of s. 221. Failure to maintain documentary evidence sufficient to explain expenditure is equally a breach of the section.

[75] Learned counsel for the plaintiff also cited the case of *Westcourt Design Sdn Bhd v. Westcourt Furnishing (M) Sdn Bhd* [2015] 11 MLJ 735 at p. 147 where the High Court found that two directors (Wan Kim Ney and Wan Kim Hong) had breached their statutory and fiduciary duties as directors as they had not adequately accounted for Westcourt Furnishing (M) Sdn Bhd's ("WFMSB") sales and financial transactions with Westcourt Design Sdn Bhd ("WDSB") nor ensured that proper records were properly prepared, kept and retrievable while they had managed WFMSB:

> [56] From the evidence as emerged, I am convinced that Wan Yin Ney and Wan Kim Hong have not satisfactorily discharged their fiduciary duties as directors of WFMSB. They have not adequately accounted for the sales and financial transactions that occurred and ensured that proper records were properly prepared, kept and retrievable during their watch. There is reasonable suspicion that they might have benefitted personally through WFMSB. As aforesaid, they also failed to prepare, keep and file the compulsory statutory accounts. In the circumstances, I hence find and hold that they have breached both their common law and statutory duties as directors of the company. In the same vein, WDSB which is controlled by Wan Kim Ney has also not properly accounted for the sales and financial transactions involved on behalf of WFMSB.

[76] Further support for the above proposition may be found in the case of *Kontron Asia Pacific Design Sdn Bhd & Anor v. Quah Sin Chye & Ors And Another Appeal* [2018] 8 CLJ 490, a company successfully sued *inter alia* its Chief Executive Officer (Dr. Sam) and director *cum* Financial Controller (CG Quah) for negligence and breach of fiduciary duties in causing the company to engage in fictitious transactions wherein payment was made without actual delivery of goods. In holding the defendants liable, the High Court pronounced as follows:

> [74] I find there is no merit in CG Quah's defence for the following reasons. CG Quah is one of the top management personnel in KDMS. He is the custodian of KDMS's money. Yet, despite knowing there are so many irregularities in the purchase orders, invoices, delivery orders and that WBC, USP and NEE had failed to make payments to KDMS, he dare not stop the payments to the supplier, TSLK. The concern of this court is why CG Quah continue approving payments to TSLK despite the obvious. Even if it is true that it is not his duty to investigate, surely, he cannot approve payments for millions of ringgit blindly also …
>
> …
>
> [78] On the facts and circumstances of this case, it is without doubt that CG Quah was negligent and had breached his fiduciary duties to the plaintiffs. By his conduct, CG had facilitated the fictitious transactions. Therefore, he is liable for the losses suffered by the plaintiffs.

[77] We find merits in the plaintiff's submission that the learned JC therefore failed to appreciate the *prima facie* culpability and wrongdoing of the majority Directors and management of the company. As executive directors, Captain Suresh and Latiff had ostensibly breached their statutory and fiduciary duties to the company.

[78] Learned counsel for the plaintiff had marshalled the following breaches of statutory and fiduciary duties on the part of the majority Directors that would justify the leave being granted for a derivative action by the company against the wrong doers in the company:

(i) failed to ensure sufficient documentary evidence is kept in the company's accounting and financial records to verify and substantiate the purported payment of approximately USD19.9 million by AMSB to Shin Yang on behalf of the company;

(ii) failed to ensure the sum of RM75.521 million recorded as shareholders advances purportedly paid by AMSB as of FYE 2018 is reversed in the financial statements of the company, given the complete absence of any documentary evidence to prove AMSB paid this sum;

(iii) failed to ensure the sum of RM13,891,168.50 (RM18,890,051 less RM4,998,882.52, being the amount actually paid by NSSB to the company) purportedly paid by NSSB to the company as shareholders' advances as of FYE 2018 is reversed in the financial statements of the company given the complete absence of any documentary evidence to prove that NSSB paid this sum to the company;

(iv) failed to ensure sufficient documentary evidence is kept in the company's accounting records to substantiate payment of the shareholders' advances recorded in the books, before approving payment of shareholders' interest to AMSB and NSSB;

(v) approved payment of shareholders' interest to AMSB and NSSB in the absence of any credible documentary evidence in the company's accounting records to substantiate payment of the shareholders advances.

[79] As for the Financial Controller, Azian, the plaintiff submitted that she had breached her duty of fidelity and equitable and contractual duties to the company by *inter alia* overlooking the irregularities and gaps in the company's accounting records, failing to ensure proper documentation was in place to support payment of the shareholders' advances and, despite the absence of such documents, permitting shareholders' interest to be paid on the basis of an unverified and *prima facie* fictitious debt.

[80] As the Financial Controller of the company and as part of the top management of the company, she must show how she had distanced and dissociated herself from the actions of the majority Directors. Otherwise following executive orders would be a defence available to all.

[81] As for the non-executive directors of the company, Johari, Dass and Sudhir, the plaintiff argued that they are equally in breach of their statutory and fiduciary duties to the company. The complete absence of independent supporting documentation to substantiate the shareholders' advances was repeatedly brought to their attention by Timor. Despite this, Johari, Dass and Sudhir refused to take any action. Whether that is true is a matter for them to answer in the trial.

[82] We cannot say that the intended action for which leave is sought is brought in bad faith and that it is bound to fail or that it is so frivolous and vexatious that its bated breath should be snuffed out at this early stage. It is sufficient if the plaintiff has an arguable case which is *prima facie* in the best interest of the company especially when the prospects if achieved would involve material savings in interests not to mention better financial discipline and disclosure in a business that promises to be a cash cow, grossing in USD220 million for an initial period of 15 years with the option of being renewed.

The Shin Yang's Acknowledgment Letters

[83] The learned judge agreed with the defendant and was of the view that the Shin Yang's acknowledgement letters ("letters") negate the need for independent third party documentation.

[84] The Shin Yang's letters do not indicate the identity and details of the payer, be it AMSB or the company. We agree with the plaintiff that the Shin Yang letters indicated payments were made by way of remittance and if this is indeed the case, the remittance records for the transfers should be available in the company's accounting records, to confirm actual payment and receipt of these payments.

[85] The learned JC had said that:

> [33] The acknowledgment of payment by Shin Yang itself negates any need to have such independent third party documentation. If there were to be any issues, it must be Shin Yang who would be questioning the Defendant.

[86] With the greatest of respect to the learned JC, that would be an over-simplification of the issue of an absence of supporting documents to substantiate the shareholders' advances into the company which money is then paid to Shin Yang as alleged. The dispute is essentially between the majority and minority shareholders. If Shen Yang had received payment as acknowledged by them then surely it is not too difficult to ask how has the payments had been received.

[87] For some business reasons, Shin Yang in acknowledging payments having being received, would have no claim or lien over the Tug Boats. However, that cannot be a substitute for the auditor's and minority shareholder's satisfaction that the payments had come from the company and captured in the shareholders' advances in its audited accounts. Otherwise there would be nothing preventing companies to have friendly parties to help them create wealth by acknowledgment of either a sum of money is due based on services rendered when there is no sum due to begin with. If auditors cannot ask for supporting documents to show the flow of funds purportedly in satisfaction of a debt owing, then that would be the beginning of the end of accountability and transparency so vital for financial integrity in the banking system underpinning commerce and industry.

[88] At Shin Yang's end there would be the clearance of cheques or evidence of online banking or for that matter cash deposit and one would expect the said sum of USD19.9 million to be captured in the audited accounts of Shin Yang. Absent that, we do not see why more light should not be shone on the transactions and more so when companies should be concerned that they do not become unwittingly the conduit for moneylaundering.

[89] The need for audit is that both business experience and past financial scandals have underscored the need for financial oversight in an independent firm of professional accountants to verify the legitimacy and authenticity of material transactions.

[90] The plaintiff expressed concerns that the fourteen Shin Yang letters do not accord with normal everyday business or accounting practice. In normal business practice, serialised official receipts are issued to record receipt of payment, which identify the payer, amount received, how it was paid and why it was paid. The Shin Yang letters do not provide the identity or even a single detail of the payer of the purported sums referred to in each of the letters; in particular whether the payer was the company, AMSB or a third party.

[91] What the plaintiff can verify is that only USD647,390 was forwarded by the company to Shin Yang out of the USD1.55 million (RM4,998,882.52) paid by NSSB to the company for remittance to Shin Yang. Further, this amount does not correspond to any of the sums referred to in the Shin Yang letters.

[92] The anomalies and aberrations in the Shin Yang's letters consisted of the following as submitted by learned counsel for the plaintiff:

(i) The Shin Yang Letters indicated each of the purported payments was by way of remittance. However, no details are given as to when or how they were remitted. Further, if this is indeed true, evidence of remittance should easily be forthcoming. They are however not in the company's records. Nor have they been produced;

(ii) The Shin Yang letters contradicted the Equity Payment Schedule furnished by Captain Suresh. The Equity Payment Schedule shows that after the deduction of around USD8.18 million in "brokerage fees," the company only required from shareholders a total sum of USD12.370 million for the balance purchase price, not the sum of USD20.55 million as per the SPA. However, the Shin Yang letters claim that Shin Yang have in aggregate purportedly received a sum of USD20.55 million as the balance purchase price;

(iii) Under the SPA, the balance purchase price of the Tug Boats was supposed to be fully settled upon delivery. However, although the last vessel was delivered to the company in June 2015, the Shin Yang letters show that the last instalment of the balance purchase price was purportedly only received by Shin Yang on 2 February 2016;

(iv) While the Shin Yang letters show the last instalment of the balance purchase price was purportedly received by Shin Yang on 2 February 2016, the company's audited financial statements inexplicably show shareholders' advances by AMSB and NSSB increasing every year until 2017, and then abruptly decreasing in 2018;

(v) As noted earlier, the balance purchase price due to Shin Yang under the SPA was USD20.550 million (approximately RM85.467 million). However, the company's audited financial statements show the total shareholders advances purportedly paid by AMSB and NSSB in fact exceeds the balance purchase price to be paid to Shin Yang according to the SPA.

[93] The court accepts the fact that someone has to decide who to appoint for the supply and delivery of the Tug Boats and Captain Suresh, being the CEO with considerable experience, would be the natural person to do the negotiation where the terms of the SPA is concerned. Having said that all financial matters affecting the payments and delivery of the Tug Boats must be seen to be above board.

[94] The argument that one should not be allowed to go behind an acknowledgment that a sum of money has been paid, is nothing new. Our Federal Court had dealt with it in *Ganam Rajamany v. Somoo Sinniah* [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123; [1984] 2 MLJ 290. In that case the Federal Court agreed with the appellant/vendor that although the agreement of sale contained as acknowledgment of the receipt of the deposit of $10,000, it was open to the vendor to prove that no consideration had actually been paid. The Federal Court further held that in that case the appellant had proved that the sum of $10,000 was not in fact received by her and therefore the total sum paid by the respondent was $26,000 and not $36,000 as found by the learned Judicial Commissioner.

[95] The Federal Court explained the correct approach as follows and the non-application of s. 91 and 92 of the Evidence Act 1950 in the face of the challenge to the acknowledgment of receipt by the plaintiff of the receipt of the deposit at p. 128 (CLJ); p. 293 (MLJ) as follows:

> Although clause 3 of Ex. P1 appears to contain an acknowledgment of the sum of $10,000.00 from the defendant at the time of the signing of the contract, it was submitted by learned counsel that the plaintiff was not estopped by sections 91 and 92 to adduce evidence that the $10,000.00 was in fact not paid or received by her. Authority for such a pro-position may be found in the Privy Council case of *Sah Lal Chand v. Indarjit* [1899-00] 27 IA 93 where it was held that (i) section 91 of the Indian Evidence Act (which is in the same terms with section 92 of our Evidence Act 1950) does not preclude oral evidence to contradict a recital of fact in a written contract and *(ii) it is settled law that, notwithstanding an admission in a sale deed that the consideration has been received, it is open to the vendor to prove that no consideration has been actually paid. If it was not so, facilities would be afforded for the grossest frauds.* In our judgment, the learned Judicial Commissioner was therefore wrong in law to shut out the oral testimony of the plaintiff that she did not in fact receive the $10,000.00 from the defendant at the time of the signing of Ex. P1 or at any time thereafter. Since the plaintiff had expressly denied receiving the $10,000.00 from the defendant and in the absence of any evidence that PW2 paid over the $10,000.00 to the plaintiff, the finding of the learned Judicial Commissioner by way of inference, that the plaintiff had received the deposit of $10,000.00 could not be supported. Based on the finding of the Court the $10,000.00 was and appears to be still being retained by PW2. (emphasis added)

[96] All that the plaintiff is asking for in the intended action is that there should be proper accounting of the actual amount claimed to be paid out by the company to Shin Yang and that the plaintiff is not estopped from calling Shin Yang to explain how the balance purchase price was paid to them even though on the face of it Shin Yang had acknowledged receipt of payment of the balance purchase price. As pointed out by the Federal Court, if it was not so, facilities would be afforded for the grossest frauds.

[97] As a director of the company, the plaintiff has a statutory right to inspect the books and records of the company, but alas the company refused the plaintiff such an access. All that the plaintiff was asking for are the usual documents that a company would keep to show the shareholders' advances into the accounts of the company and from there to who the payments had been made. Surely no matter how sophisticated such a transaction may be, there must still be some documents evidencing it more than "I say so" and the ship builder has no quarrel that it has been paid.

[98] It cannot be denied that as of Financial Year Ending ("FYE") 2018, the amount recorded in the company's books as a debt owing to shareholders for shareholders' advances is RM94.4 million. The bigger the debt the bigger

the amount paid out to shareholders as interest for these advances and it is to the tune of around RM15 million as of July 2017 ("shareholders' interest").

[99] The financial implications are serious enough. Assuming for a moment that this amount is not there or substantially less other than the portion which the minority shareholder advanced to the company, then it will be a case where the company is made to repay the advance that it did not receive and more than that, interest on the said amount. There would have been no question asked if the shareholders' advance had been advanced first into the company's account and then a payment is made out to Shin Yang. Here Captain Suresh is saying the shareholders' advance from the majority shareholder did not pass through the company's account but it went straight to Shin Yang who had confirmed in writing, though belatedly, that they have received the sum paid. In short, Captain Suresh is saying: "What more do you want?"

[100] To Timor, the truth of a matter must stand the test of transparency and with that accountability. Money has a way of colouring our perspective and changing our character. After all this is a joint-venture where there is a need for the element of mutual trust and confidence which can only be fostered in an environment where light is allowed to shine on all transactions, especially very substantial ones to the tune of USD19.9 million. Sunlight is after all the best disinfectant and electric light the most efficient policeman.

[101] To say that there are no other documents supporting such substantial shareholders' advances would leave a big yawning gap in the transactions and may even expose the company to allegations of moneylaundering and corrupt practices. Timor felt uncomfortable enough with an accounting record of a substantial shareholders' advance without the corresponding documents to support it.

[102] It indirectly affects the minority shareholders as well for they have already contributed their portion and they now have doubts as to whether the majority have so done because the money did not pass through the company's account and there is no documentary or money trail. It is actually simpler than documentary trail – it is merely the source of the shareholders' advance and the destination of the advance.

[103] Like philosophers tormented by questions that would not go away, Timor could not sit silently by watching and waiting for the answers to come. He has to take action or else nothing is going to happen. He thus felt compelled to file this action for leave to commence derivative proceedings against the management and directors responsible, for what was clear to him as a grave misstatement in the company's accounts, and the consequent loss suffered by the company.

EXIM Bank's Release Of Loan To Finance The Tug Boats

[104] The learned JC agreed with learned counsel for the defendant that as EXIM Bank had not raised any query on the payment of the company's portion of the purchase price for the Tug Boats, then everything must be above board where payment to Shin Yang is concerned. At paras. 33 and 45 of the judgment respectively, the learned JC observed as follows:

> [33] Similarly, EXIM Bank, who financed 70% of the cost of the contract, did not raise any complaints. The drawdown of the payments were all done to the satisfaction of the Exim Bank itself.
>
> …
>
> [45] The same audited financial statements were forwarded to Exim Bank, the financier of the Tug Boat Project. Again, nothing was raised with regards to the true and fair view opinion made by the auditors.

[105] With respect, the learned JC erred in uncritically accepting this as a reason for refusing leave. Whether or not EXIM Bank had any complaints had absolutely no bearing on the issue, the subject matter or merits of the proposed derivative action, or Timor's good faith in applying for leave.

[106] EXIM Bank as the financier of the Tug Boats is concerned only that the Tug Boats be free from all encumbrances, liens and adverse claims. The facility agreement did not require, as part of the prescribed disbursement procedure, the company to furnish evidence of payment of the balance purchase price, before EXIM Bank disbursed payment to Shin Yang. EXIM Bank as a matter of prudence would have confirmed with Shin Yang that it has no claim over the Tug Boats and that outstanding sums have been paid. As a bank it is only concerned with its security in the Tug Boats and in the cash flow of the borrower company from its project with vale. The bank does not concern itself with shareholders' disputes and at that time of disbursement of the balance purchase price in the 70% financing for the Tug Boats, no disputes had arisen yet between the shareholders.

[107] Thus there was no basis for saying that as EXIM Bank raised no question on or quibble the audited accounts furnished by the company, then by the same token the minority shareholder would have no right to complain. As explained, the satisfaction of the minority shareholders on the veracity or otherwise of the majority shareholder's contribution towards the shareholders' advances is none of the bank's business or concern.

The Majority Shareholder Shall Have Management Powers Of The Company's Affairs

[108] The learned JC appeared to have placed undue premium to his understanding that at paras. 37 to 40 of the judgment, that since the shareholders have agreed that the majority Directors shall have management of the company, then issues of conflict of interest and breach of fiduciary

duties raised by Timor must necessarily be subsumed into the majority Directors having their way with respect to how best to manage the affairs of the company.

[109] We agree with the plaintiff that whilst the shareholders' agreement gives AMSB the right to management control over the company, that has nothing to do with the issues in the application for leave. Here we are not talking about differences of views but compliance with the law and proper accounting treatment. Certainly, having management control and rights cannot conceivably exonerate or immunise the majority Directors and management from liability for breach of the duties they owe the company.

[110] If it were otherwise and taking the matter to its logical conclusion, it would lead to the perverse results where wrongs perpetrated against any party – be it the State, an organisation or a company, could not be put right because the person who is alleged to have committed the wrongs has the legal, statutory or contractual right to exercise control and management over the entity concerned. If this was indeed the position, it would drive a coach and horses through the general law. More alarmingly, in the context of company law, it follows that no derivative action could ever be brought!

[111] We are satisfied that the learned JC erred in this regard. No law immunises a person from accountability or liability for wrongdoing merely because the person has the right of management and control. The converse is true that the person is held accountable as one who has to faithfully discharge the trust reposed on him for the best interest of the company or entity. It would be wholly offensive to public morality and public policy if it were not so.

[112] Control is precisely the obstacle a derivative action is intended to overcome to hold wrongdoers to account especially where persons alleged to have committed wrongs against the company are themselves in control of the company; and so are able to thwart any attempt to seek relief or redress by the company. This was explained in *Ong Keng Huat v. Fortune Frontier (M) Sdn Bhd & Anor* [2015] 10 CLJ 599 at p. 48 as follows:

> [74] The crux of a derivative action is to allow a complainant to seek leave for the company to institute a suit for a cause of action which has a reasonable prospect of success which otherwise cannot be pursued due to the involvement of a wrongdoer insider having the ability to prevent the filing of the suit by the company.

[113] It was Crowe Horwath that highlighted this conflict of interest in their supplementary report as follows:

> Due to the significant nature of the transaction and substantial amount, the management would normally seek for proof of cash settlement by AMSB. These transactions raise questions also because there exists an issue of conflict of interest as AMSB exercises Board control as well as management powers in [the Company].

[114] The learned JC did not appear to have considered that prior to Azian's appointment as the Financial Controller of the company, Timor and Wan had objected to her appointment, due to potential conflict of interest. Azian was at the time also the Chief Financial Officer and a director of AMSB, a director of Azimuth Shipping Corporation Sdn Bhd ("ASM") (a company owned by EISC, which is turn owned or controlled by Captain Suresh and family) and the Company Secretary of both EISC and Hawk Energy Sdn Bhd, another company owned by EISC. Ultimately however due to the insistence of Captain Suresh, Timor and Wan at a Board meeting on 22 August 2013 reluctantly accepted Azian's appointment for the time being and gave her benefit of the doubt. Their reservations appear to be valid, viewed against the backdrop of this leave application to commence a derivative action.

[115] We are of the considered view that the High Court had erred in giving undue deference to the action of the majority Directors merely because they were in control of the management of the company without due regard being given to a probable breach of statutory duty of directors to keep proper accounting records to substantiate material transactions of the company.

Approval And Payments Of Shareholders' Interest And Dividends

[116] The learned JC, in agreeing with learned counsel for the defendant, seemed to have taken the view that since the minority shareholder in NSSB had received shareholders' interest, then it is too late to complain of misstatement in the company's audited accounts of the shareholders' advances. However as explained by Timor, when the JV first started, he had no reason to suspect that the amount advanced by the two shareholders would be other than in the agreed proportion of 90:10 as agreed between them, AMSB and NSSB respectively.

[117] Timor had explained that as soon as he found, on being apprised by Crowe Horwath on the absence of any credible supporting documents in the company's records to substantiate payment of shareholders' advances in excess of RM90 million, both Timor and Wan, the minority Directors, had stopped approving shareholders' interest from 2017 onwards, much to the annoyance of the majority shareholder.

[118] We can appreciate that when the JV first started in 2013, there was not much business as the Tug Boats were being built and were only delivered in June 2015 and then the company only started generating revenue close to USD9 million for that year from the services provided to Vale in the Tug Boats. If the company's business model and projection are right, they are looking at grossing in USD220 million for an initial period of 15 years with the option of being renewed.

[119] At any rate, we fail to understand how by the minority shareholder having accepted some payments of shareholders' interest, they are then barred forever from disputing the correctness of the shareholders' advances captured in the audited accounts. Timor accepts the fact that if the wrong amount of shareholders' advances would impinge on their portion of the advance, then they would also have to refund the interest paid and had given an undertaking to that effect. Accepting the argument that the minority shareholder cannot raise this issue of a restatement of the audited accounts would mean that the minority shareholder must continue to approve and accept the shareholders' interest in spite of their belief that the advances had been wrongly captured in the audited accounts. That would leave no room for repentance after realising one's sins of omission in not raising the objection earlier. That cannot be right in a case where a wrong is discovered later and the focus now has to be how to correct the wrong instead of being complicit in perpetuating a wrong.

[120] The High Court in paras. 40 and 41 of the judgment, with respect, appeared to be unduly swayed by the submission of learned counsel for the defendant with respect to the non-objection by the minority shareholder NSSB without considering that at that time, the minority was not aware of anything being amiss:

> [40] Things were seemingly normal between AMMB and NSSB as the project was up and running. There were no complaints made by the Plaintiff then. The Shareholders' Interest was paid according to the Shareholders Agreement. It was acknowledged and received by NSSB. …
>
> [41] It can be seen in the table above that decisions regarding payment of Shareholders Interest were taken in the presence of the Plaintiff or Dato' Wan. They together with NSSB have never raised the alleged discrepancies in the Shareholders' Advance or Shareholders' Interest with the Defendant or with AMSB.

[121] The context and surrounding circumstances of the simmering suspicion must be appreciated as following the Crowe Horwath's preliminary report prepared as a result of the Inspection Order from another High Court, Timor's solicitors repeatedly wrote to the company's solicitors to request supporting documents to evidence the shareholders' advances.

[122] The parties were engaged in a protracted exchange of correspondence on this from February 2017 to November 2018. When no supporting documents were forthcoming from the company's management, the plaintiff can hardly be faulted for having a legitimate concern as to the veracity of AMSB's purported payment to Shin Yang and, in turn, the shareholders' advances.

[123] Timor and Wan, the minority Directors, stopped approving, after July 2017, the payment of shareholders' interest on the advances. By then they had a basis to take such a position that until all issues pertaining to payment of the balance purchase price to Shin Yang and the shareholders' advances have been properly verified and substantiated, they would not be approving such payments out.

[124] Consistent with the stand taken, Wan declined to sign cheques for payment of shareholders' interest forwarded to him by Captain Suresh on 6 March 2018, as Timor and he had not received the requested documentation to show AMSB's actual shareholders' advances to the company.

[125] At a Board Meeting on 10 April 2018, Timor took the position the Board should defer payment of shareholders' interest until all issues relating to the company's accounts have been resolved. Timor also noted he had not been provided with supporting documents to evidence payments made by the company to Shin Yang.

[126] Therefore, rather than being said to be comfortable with and consenting to the payment of shareholders' interest, the minority shareholder, on becoming aware of the discrepancies and probably dubious shareholders' advances, unsupported as they are by relevant documents, had deferred and refused to approve the further repayment out of the shareholders' interest until the issues are resolved.

[127] With respect, the High Court was plainly wrong in finding that Timor and NSSB had not raised the discrepancies in the shareholders advances with the company or minority shareholder AMSB. The documentary evidence plainly shows when the company received Shin Yang's demand, Timor had made, from August 2015, repeated requests for supporting documents related to the accounts and copies of the relevant accounting records at Board meetings and by emails and letters. He also sought to inspect the books of the company.

[128] The High Court, in agreeing with the defendant, also failed to appreciate that the issue of dividends is a completely separate matter from the shareholders' advances. As we are aware, under the Act, dividends are payable to all shareholders if there are profits generated by the company. Indeed, if there are less payment out of shareholders' interest, which is a costs to the company for the internal financing from the shareholders' advances to help finance the Tug Boats, in the context of questionable payments, there would be more profits available for payment of dividends to shareholders.

[129] In any event, Timor expressly stated in his email dated 25 May 2018 that NSSB's acceptance was conditional and without prejudice to its rights to question the irregularities in the company's accounts and was not to be

taken as acknowledgment and acceptance of the obvious discrepancies in them. That was a reasonable approach to take as one can appreciate that the majority shareholder in AMSB would be keen to recoup its returns from their investment as soon as possible judging from their cash flow projection.

Accounts Audited

[130] The High Court, with respect, and in agreeing with learned counsel for the defendant, took the view that as the accounts of the company had been audited with no qualification, the minority shareholders are not allowed to question the audited accounts any further. If that were true, then there would have been no cases where accounts have to be restated and there would have been no financial scandals as invariably the accounts of these companies had been audited with no red flags raised. Further going by what was stated by the learned JC, in agreeing with the defendant, there would be no cases of financial irregularities or misstatement of accounts or even accounting frauds because these would have been discovered upon an auditing exercise being done.

[131] The perennial question of who audits the auditors has been addressed by Parliament. Like all professionals, there is a need for an oversight body and with respect to Public Listed Companies the Securities Commission ('SC") had set up the Audit Oversight Board to enforce breaches by auditors in cases of a failure to comply with relevant requirements of the International Standards on Auditing ("ISA") in the performance of an audit. It is established under Part IIIA of the Securities Commission Malaysia Act 1993 ("SCMA") which came into force on 1 April 2010 to promote and develop an effective audit oversight framework and to promote confidence in the quality and reliability of audited financial statements in Malaysia.

[132] The same principle would apply to private limited companies like the company here. The Malaysian Institute of Accountants ("MIA") is a statutory body established under the Accountants Act 1967 to regulate the accounting profession in Malaysia. It has its Surveillance and Enforcement Division tasked with investigating complaints against auditors in their auditing of companies account and non-compliance with the regulatory framework in place.

[133] We would be slow in concluding that all is well with a company's account after the auditors have issued their audited report. The number of cases of auditors being fined and sanctioned as disclosed in the websites of SC under their AOB and the MIA under their Surveillance and Enforcement Division should dispel the notion and debunk the myth that all has to be fine after the audited accounts have been signed off by the auditor.

[134] The learned JC at paras. 44 and 48 of the judgment, appeared to be saying that the minority shareholder should forever hold their peace as the auditors have given a true and fair view of the company's accounts:

[44] It is the finding of this Court that each of the auditors gave a true and fair view opinion of the Defendant's financial position on the respective financial statements for the corresponding years. None of the auditors raised issue with regard to the Shareholders' Advances recorded in the company's books.

…

[48] The finding of three (3) separate auditors demolishes any reason for this Court to enquire further or entertain the complaint of the Plaintiff.

[135] As highlighted by learned counsel for the plaintiff, in the first place, the company's accounts were only audited by two auditors. The third auditor was BDO who abruptly resigned on 12 June 2018 without signing off and lodging the company's financial statements for FYE 2017 although the majority Directors by then had approved the audited accounts and authorised Captain Suresh and Johari to sign and submit them.

[136] Learned counsel for the plaintiff clarified that the company's financial statements for FYE 2017 were therefore those audited by the company's present auditors UHY, who also audited the company's accounts for FYE 2018. As for the company's accounts for FYE 2013 to 2016, these were audited by SCS Global & Co, who also resigned in early 2017. Significantly, BDO resigned shortly after Timor issued a letter dated 18 April 2018, to inform them of the unresolved issues relating to the company's accounts.

[137] The learned JC should have considered the resignation of BDO as an auditor of the company as a relevant factor in exercising his discretion whether or not leave should have been granted for the derivative action. The Act takes a serious view of resignation of an auditor of a company as can be seen in ss. 282 and 284 that read as follows:

Notice of resignation of auditor to Registrar

282(1) Where an auditor resigns his office, the company shall send a copy of the notice to the Registrar within seven days from the receiving of a notice of resignation.

(2) The company and every officer who contravene this section commit an offence.

Duty to inform upon cessation of office

284. If an auditor has made written representation to the company under subsection 277(3) or **if an auditor gives notice to the directors of the company under subsection 281(1),** the auditor shall:

(a) submit a copy of the written representation or **his statement of circumstances connected with his resignation to the Registrar**; and

(b) in the case of a company whose shares or debentures are quoted on a stock exchange, submit a copy of the statement of the stock exchange, within seven days from the submission of the written representation or his notice of resignation. (emphasis added)

[138] The main objective of an audit is not to detect specific irregularities *per se* but for the external auditor to express an opinion on whether the financial statements prepared by the management and directors give a true and fair view of the financial position of the company and are in all material respects in accordance with an applicable financial reporting framework. See s. 266 of the Act.

[139] The High Court must caution itself that the company's management and Board that prepared and authorised the accounts are under the control of the majority shareholder, AMSB and with that the danger of a compromise in the information and documents furnished to the auditors. It follows that the company's audited financial statements cannot be placed on the same footing as the reports of Crowe Horwath, an independent professional audit firm appointed pursuant to the inspection order to inspect the books of the company and report their findings. In any event where the auditor pursuant to the inspection order expressed the view that the shareholders' advances to the tune of USD19.9 million cannot be verified because of a lack of supporting documents and the company's auditors on the other hand stating that it had formed a true and fair view of the matters stated in its financial statements, it behoves the High Court to provide the minority shareholder with an opportunity to prove their claim over a very material transaction in the company's finances.

[140] In this regard, the audit report issued by UHY for the FYE 2018 makes clear, in the language of cautious circumspection, the risk of them not detecting fraud in their audit is higher than one resulting from error as follows:

> As part of an audit in accordance with approved standards on auditing in Malaysia and International Standards on Auditing, we exercise professional judgment and maintain professional scepticism throughout the audit. We also:
>
> identify and assess the risks of material misstatement of the financial statements of the Company, whether due to fraud or error, design and perform audit procedures responsive to those risks, and obtain audit evidence that is sufficient and appropriate to provide a basis for our opinion. *The risk of not detecting a material misstatement resulting from fraud is higher than for one resulting from error, as fraud may involve collusion, forgery, intentional omissions, misrepresentations, or the override of internal control.*
>
> (emphasis added)

[141] We find merits in the argument of the plaintiff that it would be a failure to take relevant factors into consideration and plainly wrong for the learned JC to accept the majority Directors' argument and find the company's accounting or other records are free of irregularities simply because they have been audited.

[142] Timor had, following the company's receipt of Shin Yang's demand in August 2015 and the majority Directors and management's refusal to provide an explanation and copies of the relevant accounting records, declined to approve the company's draft audited financial statements for FYE 2015, 2016, 2017 and 2018. It is obvious Timor cannot be precluded from challenging the correctness of the company's audited accounts merely because he had previously approved them: See *Soo Boon Siong v. Saw Fatt Seong & Or*s [2008] 1 CLJ 365; [2008] 1 MLJ 27 at pp. 285 to 286, paras. 80 to 82.

[143] The plaintiff invited this court to cast an eye at a myriad of cases both locally and abroad where irregularities and fraud were discovered, despite the relevant accounts of the company concerned having been audited time and time again, including cases like 1Malaysia Development Berhad (1MDB), Transmile Group Berhad *(Khiudin Mohd & Anor v. Bursa Malaysia Securities Bhd & Another Case* [2012] 7 CLJ 407) and Patimas Computers Berhad *(Law Siew Ngoh v. Bursa Malaysia Bhd & Anor* [2017] 1 LNS 1262).

[144] We agree with the plaintiff that the finding also ignores another equally notorious fact – the myriad instances in which auditors both locally and abroad have been held to account and brought to book over their audits.

[145] It has been fairly stated by learned counsel for the plaintiffs that the courts have held the fact that accounts of a company have been audited does not absolve directors of their duties in regard to the company's accounts. In *Khiudin Mohd & Anor v. Bursa Malaysia Securities Bhd & Another Case* (*supra*), irregularities were present in the company's accounts despite them having been audited by both internal and external auditors. The High Court held the company's management and directors could not exonerate themselves from liability for the irregularities and breach of their duties to keep proper accounts by relying on the fact the company's accounts had been audited.

[146] There were also other financial irregularities highlighted one of which is that the amount of shareholders' advances purportedly paid by AMSB, if any, should be identically recorded in both the company's and AMSB's audited financial statements for each of the relevant financial years, for the purpose of preparing the group's consolidated accounts as required under ss. 244(1), 249(2) and 250 of the Companies Act 2016.

[147] The plaintiff had emphasised that the shareholders advances' purportedly paid by AMSB substantially differs, depending on whether one refers to the audited financial statements of the company or to AMSB's own audited financial statements. For instance, there is a significant difference of RM6,843,127 between the shareholders' advances recorded in the company's financial statements and the shareholders advances recorded in AMSB's financial statements as at 30 September 2016, as set out below:

FYE	Co's Audited Financial Statements	AMSB's Audited Financial St	Difference
2013	RM17,288,504	RM16,445,835	RM84,266.90
2014	RM38,228,744	RM37,005,023	RM1,223,721
2015	RM62,562,148	RM49,274,418	RM13,287,730
2016	RM75,938,140	RM69,095,013	RM6,843,127

[148] The fact these figures materially and significantly differ without any explanation is a fundamental irregularity which was wrongly disregarded by the learned JC.

[149] The learned JC should have taken into consideration the Crowe Horwath's reports and observations which indicated there were material and significant irregularities in the company's audited accounts which had not been detected by the auditors. *Prima facie* that plaintiff had crossed the threshold test of having acted in good faith and for the best interest of the company in his leave application.

Whether There Was Good Faith And No Collateral Purpose

[150] The learned JC seemed to have imputed bad faith and a collateral purpose on the part of the plaintiff when he observed as follows:

> [53] It was open for the Defendant to argue that the various litigations were designed in a manner to achieve the said buyout of NSSB. Be that as it may, what cannot be denied is the tenacity of the Plaintiff in launching the series of litigation. Looking at the reasons put forward, it cannot be purely for altruistic reasons.
>
> …
>
> [55] It is perplexing as to why the Plaintiff is raising his complaints three (3) years after the final payment to Shin Yang had been made when he had the opportunity to do so back then in 2015. This brings into scrutiny the purpose for the Plaintiff in bringing this action only at the time when the shareholders are at odds with each other. As such, at the very minimum, action brought by the Plaintiff had the collateral purpose of intending to disrupt and destabilise the operations of the Defendant.

[151] We do not think the learned JC should have read the tenacity of the minority shareholder through its persona in Timor to be that of a trouble-maker – bent on killing the goose that is still laying consistently its golden eggs. When a minority Director highlighted discrepancies discovered pursuant to an independent audit carried out following the inspection order of the court, the court should look at it dispassionately and see if *prima facie* there are some merits in the complaint justifying a derivative action.

[152] This is apart from the fact that the parties have developed a measure of animus and angst against each other. We agree with the plaintiff that the existence of hostility or disputes between shareholders, or even questionable motivations are by themselves insufficient to show lack of good faith. After all, when JV parties sue each other in court, we cannot expect them to be cordial to each other and as expected, accusations are often met with counter-accusations. Some fireworks are expected and perhaps through the crucible the impurities would percolate to the surface, leaving the refined gold behind.

[153] The refined gold is the mission or purpose of the derivative action, shorn of the personalities that may have commenced the action; a case of separating the actors from the actions, the personalities from the problem. We need to ask if Timor's judgment is so clouded and coloured by purely personal considerations designed for personal profit in bringing the proposed derivative action that is inconsistent with the interest of the company as a whole and even damaging to the company's interest?

[154] We are not unaware that there are instances where the venom of a personal vendetta is both vexatious and vituperative such that it contaminates and corrupts all actions taken, where the personal agenda would take centre stage and that anything remotely for the best interest of the company is only peripheral as in a pass over. We see nothing of a knee-jerk reaction from Timor and the actions taken are not that of revengeful retribution but reasoned and reasonable. It cannot be said that Timor in speaking for the minority shareholders have distorted the dispute beyond all proportion of decency or that it is designed to distract and destroy the company.

[155] The Singapore Court of Appeal in *Ang Thiam Swee v. Low Hian Chor* [2013] 2 SLR 340 at p. 348 observed:

> 16. The general tenor which emerges from the case law is that good faith is dependent less on the motives which trigger the application for leave to bring a statutory derivative action, and more on the purpose of the proposed derivative action, which must have an obvious nexus with the company's benefit or interests …

[156] Our Court of Appeal in *Tai May Chean v. United Eastern Resources Sdn Bhd & Anor* [2022] 2 CLJ 757 had observed as follows:

> [88] We are of the view that, more often than not, a leave application of this nature is constrained by the parties sometimes obstinately refusing to agree with the other in the context of trouble brewing and even boiling over in disputes that have disrupted if not destroyed the already fragile relationship of mutual trust and confidence. Such being the case, we need to tease out the material facts not in dispute and see if there are any valid reasons proffered for prohibiting what is *prima facie* an action that can only be for the best interest of the Company. It does not matter if the same parties are already litigating at various fronts and that this move by one may be seen by the other as trying to score points in the overall tally of the battle and the bigger scheme of things.

A [89] Parties may even be hostile towards each other arising out of a total collapse of the element of mutual trust and confidence. It is only too true that love can so easily turn to hate and that trust once broken, is difficult to be restored.

[90] Decided cases have illustrated that when faced with the allegation
B of a collateral and oblique purpose in seeking leave, the plaintiff applicant must point to the cold facts that cannot be contradicted that if leave is granted, *prima facie* the action would be in the best interest of the company.

…

C [93] The cases suggest that **the focus and concern of the Court should be less on the motive that triggers the action but the mission that the action is sought to achieve.** For after all, as Solomon would remind us, the purposes of a person's heart are deep waters and it would take one who has insight to draw them out. (emphasis added)

D **[157]** In *Ong Keng Huat v. Fortune Frontier (M) Sdn Bhd & Anor* [2015] 10 CLJ 599; [2015] 11 MLJ 604 Justice Mohd Nazlan JC (now JCA) gave this helpful distinction between motive and purpose and held at para. 46 as follows:

The court ruled that the onus was on the applicant to establish good faith
E on his part and the court must assess the motivations of an applicant in order to determine whether he is acting in good faith. *Good faith was stated to be less dependent on the motives which trigger the application, but more on the purpose of the proposed derivative action, which must have a clear nexus with the company's benefits or interests.* The motivations of the applicant would only amount to a lack of good faith if they revealed that the applicant's
F judgment was influenced by purely personal considerations. The applicant must demonstrate that he is genuinely aggrieved and that *his collateral purpose is sufficiently consistent with the objective of doing justice to the company.* (emphasis added)

[158] We cannot comprehend why when a director is keen to have the court
G decide on whether the accounts of the company has been properly audited in accordance with the Malaysian Accounting Standard or the International Financial Reporting Standard, there should be such vigorous opposition to it.

Whether It Is In The Best Interest Of The Company

H **[159]** The plaintiff has a point when they said the company is presently saddled with a wholly unverified and unsubstantiated debt in excess of RM90 million as of FYE 2017, based on which millions of ringgit in shareholders' interest is continuing to be paid out by the company. The company therefore would gain substantially in money terms by the proposed derivative action.
I Depending on the relief ultimately granted in the proposed derivative action, apart from being relieved of this RM90 million plus debt represented as

shareholders advances in its books, the company stands to recover shareholders' interest paid by the company to NSSB and AMSB amounting to RM14,619,166.17. Any savings to the company would also benefit the majority shareholder and in fact would benefit them more by virtue of the size of their shareholding being 80% of the equity of the company.

[160] If the shareholders advancers are reversed out for those that are not supported by documents, it can only mean that more of the revenue would be translated into profits as there would be less shareholders' advances to pay back to the majority shareholder concerned and less shareholders' interest to be paid out. What is left behind then is higher profits because costs is less with the result that more dividends could be paid out in accordance to the proportion of the shareholding of the majority and minority of 80:20. The majority would still stand to gain but that the accounting is now properly done.

[161] We have not forgotten our maths that if the shareholders' advances were not totally unsupported by documents and that at the trial Shin Yang could not explain how they have been paid and if the shareholders' advances were reversed out, it would mean that had it not been for the derivative action, the majority shareholder would have received a windfall to the tune of USD19.9 million minus the portion contributed by the minority shareholder for which there is evidence in support. There would also be the reversal out of shareholders' interest for it should not be paid if the advances had not come into and validly captured in the audited accounts.

[162] Of course we are not unmindful that if the High Court should so find at the end of the proposed derivative action that the sum of USD19.9 million should be reversed out and the account restated, there would be some red faces. However, all is not lost because the chief consideration of all shareholders should be the ultimate best interest of the company as a whole.

[163] Dogged determination and tough tenacity are not necessarily bad traits for after all, litigation on various fronts are not for the faint-hearted. Learned counsel for the plaintiff stated that the plaintiff has been successful in almost all litigation in favour of Timor and the minority shareholder NSSB that he represents, including the following suits:

(i) Kuala Lumpur High Court Originating Summons No. WA-24NCC-179-04-2016 ("Suit 179");

(ii) Kuala Lumpur High Court Suit No. WA-22NCvC-196-04-2017 ("Suit 196");

(iii) Kuala Lumpur High Court Suit No. WA-22NCC-165-05-2017 ("Suit 165"); and

(iv) Kuala Lumpur High Court Suit No. WA-22NCC-113-03-2018 ("Suit 113").

[164] In Suit 179 (the inspection order suit), the High Court found in favour of Timor and dismissed the majority Directors' claim that he had ulterior motives in requesting to inspect and take copies of the company's accounting records. In so holding, the learned JC (now JCA) Justice Mohd Nazlan bin Mohd Ghazali found the allegations by the majority Directors against Timor did not "even remotely come close to constituting any form of clear evidence of improper or ulterior motive …"

[165] In Suit 196 between NSSB and Azimuth Ship Management Sdn Bhd ("ASM"), a ship management company of which Captain Suresh is the ultimate controlling shareholder, the High Court granted an order allowing NSSB to claim monies payable which Captain Suresh reneged on though he had agreed to pay the sum to NSSB on behalf of ASM.

[166] In Suit 165, Justice Darryl Goon Swee Chye J (later JCA) dismissed Sudhir's claim against NSSB for a declaration that the transfer of shares to him by AMSB was valid based on a purported "collateral understanding" between parties.

[167] In Suit 113, the High Court allowed NSSB's claim against Sudhir for procurement of breach of their shareholders' agreement with AMSB and *inter alia* ordered Jaya Sudhir to transfer his shares in the company back to AMSB.

[168] Then there is the latest decision of Justice Darryl Goon Swee Chye J (later JCA) in *Nautilus Tug & Towage Sdn Bhd v. Nautical Supreme Sdn Bhd & Ors* [2022] 4 CLJ 594 where the High Court dismissed the company's claim against NSSB and Timor and Wan for the company's claim against NSSB, Timor and Wan, founded upon the tort of conspiracy to injure NTT by lawful and/or unlawful means. As against Wan, the claim concerned his participation as a co-conspirator. As for Timor and Wan specifically, the company's claim against them both was for alleged breaches of their fiduciary and other duties owed to company as director.

[169] The High Court dismissed all of the Company's claim against NSSB, Timor and Wan and in doing so made the following observations:

> [162] What might have begun as a suspicion of there being something amiss in respect of the financials of NTT could not have been allayed by Suresh's C initial non-response to Timor's queries about NTT's accounts. This, coupled with the persistent refusal to allow for copies of the financial records to be provided, no doubt induced Timor's need for a court order to allow him, as a director, to inspect and have copies of NTT's accounts and financial statements. With the seeds of such distrust sowed, it would be difficult to imagine how the relationship between the representatives of the two joint venture companies might progress without any attrition. Having seen and heard Timor and Suresh as witnesses, they appear to me to be strong-willed individuals. Neither seemed to be a person who would countenance being perceived to be dictated to by the other.

> [163] What was alleged by NTT as causing strife and disharmony, was in my view, ultimately a continuation of Timor's concern with Suresh's manner of management and the transparency he did not seem to be able to secure.
>
> …
>
> [215] While Timor's concerns were probably associated with the interest of NSSB, it does not follow that this was necessarily in conflict with NTT's interest. NSSB's interest was, in the circumstances of this case and as pointed out, synonymous with NTT's interest. The factual scenario was such that NSSB's interest, as a shareholder in NTT, would be served by ensuring that NTT, as the joint venture vehicle, was managed properly and its finances and assets were not compromised in any way. Concomitantly, this too was necessarily in the interest of NTT. Thus, in my view, upon the facts and circumstances of this case, there was no subordination or compromising of NTT's interest in favour of NSSB by Timor or Wan in their role as directors of NTT. I can see no breach of duty on the part of either Timor or Wan or how, having regard to the circumstances of this case, concern for NTT's finances, assets and management can be contrary or injurious to its interest.
>
> [218] In my view, Timor's concerns about corporate governance and in particular his queries regarding the payment to Shin Yang Shipyard Sdn Bhd, were consistent with the interest of NTT while at the same time indirectly protective of NSSB's interest in NTT as well. …

[170] Granted, each case must be decided based on its own particular and peculiar facts. However, it cannot be said that the tenacity of the plaintiff would militate against the requirement of good faith or that it would show the plaintiff having acted for a collateral purpose. It would be too high a test if Timor has to show that his action was purely altruistic. There is perhaps even a place for selfish altruism having a convergence with the best interest of the company as a whole as was observed by Justice Darryl Goon Swee Chye J (later JCA) in the above case with respect to Timor's conduct:

> [214] … Indeed, it is the very nature of derivative actions that they are brought in the interest of, and for, the company. *Timor's concern and actions may not have been purely altruistic but that is not the same as having an intention to injure NTT. The only probable reason for his concern and actions would have been a concern for the interests of both NSSB and NTT as the joint venture vehicle,* but for whose interests Timor would not have had any role in NTT.
>
> (emphasis added)

[171] If there is any delay in filing this application for leave, it is that long suffering is a virtue in the circumstances of this case where every opportunity should be given to the majority Directors to explain the queries and that a derivative action would be the last straw where all prior overtures had been rebuffed such a delay cannot be equated with a collateral purpose. See *Teo Gek Luang v. Ng Ai Tiong* [1999] 1 SLR 434 at para. 20.

[172] The Court of Appeal in *Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak* [2010] 7 CLJ 808 and *Abdul Rahim Suleiman & Anor v. Faridah Md Lazim & Ors* [2017] 1 CLJ 633 have held that in evaluating the requirement that the proposed action is *prima facie* in the best interest of the company, the question should be whether, having considered the facts of the case, the company would gain substantially in money or money's worth.

[173] Timor had ceased to approve the company's draft audited accounts when suspicions arose that something was amiss with the company's accounts, after the fortuitous action in Shin Yang's demand on 3 August 2015.

[174] Likewise Timor and Wan ceased to approve payment of shareholders' interest and NSSB also ceased to accept shareholders' interest on becoming cognisant of the absence of any credible supporting documents in the company's accounting records to substantiate payment of shareholders advances in excess of RM90 million.

[175] Moreover, NSSB has also undertaken to refund the interest it received on the portion of shareholders advances it did not pay to the company.

[176] The learned JC's reliance on *Swansson v. Pratt* [2002] NSWSC 583 and *Nurcombe v. Nurcombe* [1984] BCLC 557 is also misplaced. Unlike *Swansson* (*supra*), Timor is plainly not a direct and knowing participant in the alleged wrongdoing of the putative defendants. Timor was never informed of the amount of shareholders' advances paid by AMSB. He ceased approving the company's draft audited financial statements and also payment of shareholders' interest on becoming aware of the absence of any credible supporting documents to substantiate the shareholders' advances.

[177] The facts in *Nurcombe v. Nurcombe* (*supra*) are equally inapplicable for several reasons. In that case, the applicant, upon becoming aware of the wrongdoing against the company, elected not to commence an action on behalf of the company but instead chose to continue pursuing personal matrimonial proceedings in order to gain a financial reward. Having already elected to pursue one particular avenue of redress, the applicant was precluded from also bringing an action on behalf of the company. In the present case, Timor from the outset elected to commence derivative proceedings to seek redress for the wrongs against the company.

[178] Whether the proposed prayers to recover unjustified payment of shareholders' interest on the shareholders' advances of RM14,619,166.47 and for a restatement of the company's accounts is ultimately granted will surely depend on the outcome of the derivative action itself and the decision of the trial court in that action. The wrongdoing of the putative defendants would first have to be determined, in order for the trial court to decide what form of reliefs would be appropriate to grant. Not to jump the gun, at this

juncture, the court is solely concerned with Timor's good faith in bringing the application for leave and whether allowing the application is *prima facie* in the best interests of the company.

[179] We have difficulty following the argument of learned counsel for the defendant that the proposed derivative action would distract the company from its focus on the lucrative business with vale and that there would be much dissipation of time and energy, not to mention the further aggravation and attrition caused. With respect, we do not think so. If the documents sought are not there to substantiate the shareholders' advances, there is no need to spend more time to search for it as in looking for a needle in the haystack. If it is not there, it is not there.

[180] Already parties are fully aware of the facts of the case as can be seen in the full trial before Justice Darryl Goon Swee Chye in *Nautilus Tug & Towage Sdn Bhd v. Nautical Supreme Sdn Bhd & Ors* [2022] 4 CLJ 594 and as rehashed many times over in the voluminous documents filed in the various suits and actions before the courts. Both sides need to remember only one version of the story to be told which is the true version.

[181] We cannot say that the real intention of the plaintiff, as theorised by learned counsel for the defendant, is to orchestrate a buy-out at a good price if it is the minority shareholder that is selling or conversely at a low price if it is the minority shareholder that is buying out the majority. If at all that should happen, it is more of an unintended consequence as parties after losing honourably may just want to throw in the towel and walk out to focus on more peaceful pursuits.

Conclusion And Decision

[182] Learned counsel for the plaintiff submitted that at the heart of this matter and appeal is a simple question – in these circumstances and on the facts, has an arguable case been made out for leave to be granted to institute derivative proceedings against those in control of the management and affairs of the company, to hold them to account for this sum?

[183] It would not be fair to suggest that the plaintiff was trigger-happy in launching this action for he had tried to engage the majority Directors in resolving the question he had about the accounts of the company. We see no traces of him shooting from the hip. It was not for want of trying that he was not given a satisfactory answer to what is after all a very material transaction in the purchase of the Tug Boats and the substantial sum said to have been advanced by the majority shareholder.

[184] We see no harm and everything to gain from proper corporate governance for more light to be shed on the substantial advance where the company is paying out interest at the rate of 7% per annum on the amount advanced.

[185] The suit if successful can only benefit the company and as the majority shareholder, they would also stand to gain and would have nothing to lose if greater light is shed on the advances by the majority shareholder to fairly and accurately reflect the sums advanced. We proceed on the premise that everyone should love the light unless one has things to hide and fear exposure.

[186] We find that the plaintiff/appellant has fulfilled the threshold test of good faith and for the best interest of the company in his concerns that the company should comply with the requirements of keeping proper accounting records of the company as required under the Companies Act 2016.

[187] However, we do appreciate that the plaintiff/appellant should put their money where their mouth is and that they should bear all fees, costs and expenses of the derivative proceedings and can only claim on a full indemnity basis should they succeed at the end of the trial and appeals therefrom.

[188] We therefore had allowed the appeal and set aside the order of the High Court and we granted an order in terms of encl. 59 in prayers 1 for the leave to commence derivative proceedings against the putative defendants named, 2(a) that the plaintiff be authorised to control the conduct of the derivative proceedings, (b) and directions as may be ordered by the High Court where the action is brought.

[189] Costs of this application of RM20,000 subject to allocator to be cost in the cause in the High Court.